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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

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FILED
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JOHN F. DAVIS, CLERK

No. 432

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR INTERVENORS IN OPPOSITION

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BRIEF FOR INTERVENORS IN OPPOSITION[1]

OPINIONS BELOW

The order of the Federal Maritime Board and the unanimous opinion below are set forth in Appendix B to the petition (pp. 18-31).

[1] This brief is filed on behalf of intervenors American Export Lines, Inc., American Stevedores, Inc., Anchor Terminal Service Co. Inc., Atlantic Stevedoring Co. Inc., Bay Ridge Operating Co. Inc., Bull-Insular Line, Inc., John T. Clark and Son, Compania Sud-Americana De Vapores (Chilean Line), The Cunard Steamship Company Limited, Grace Line Inc., International Terminal Operating Co., Inc., Maher Stevedoring Co. Inc., Marra Bros. Inc., Maude/James, Inc., John W. McGrath Corporation, Nederlandch-Amerikaansche Stoomvaart Maatschappij "Holland-Amer-

JURISDICTION

The jurisdictional requisites are set forth in the petition.

QUESTION PRESENTED

Whether tariffs of rates (not dual rates) authorized by and issued pursuant to a basic Agreement (conference) approved by the Federal Maritime Board were new agreements or modifications of the basic Agreement requiring separate Board approval under section 15 of the Shipping Act, 1916, prior to its amendment on October 3, 1961.

STATUTES INVOLVED

Section 15 of the Shipping Act, 1916, as it read when petitioner's complaint was filed with the Board, is set forth in Appendix A to the petition (pp. 16-17). Section 15 as amended by section 2 of the Act of October 3, 1961, P. L. 87-346, 75 Stat. 762, is set forth in Appendix A to this brief, *infra*, pp. 1a-3a.

STATEMENT

Intervenors operate waterfront terminal facilities in the port of greater New York (JA 2-11)[2] and are parties to Federal Maritime Commission Agreement No. 8005,[3] which

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ika Lyn" (Holland-America Line), Norwegian American Line Agency, Inc., Packet Shipping Corporation, Pioneer Terminal Corporation, Pittston Stevedoring Corp., Rowland and Liesegang, Inc., Seaboard Contracting Company, Inc., Sealand Dock & Terminal Corp., Jules S. Sottnek Company, Inc., Sottnek Terminal Corp., Standard Terminal Stevedoring Inc., Transoceanic Terminal Corporation, The United Port Service Company, Universal Terminal & Stevedoring Corp., and West Coast Line, Inc.

[2] "JA" references are to the Joint Appendix in the Court of Appeals.

[3] Throughout the proceedings below the Agreement was known as Federal Maritime Board Agreement No. 8005. The Commission has succeeded to the Board's functions by virtue of Reorganization Plan No. 7 of 1961, 26 FED. REG. 7704 (1961).

provides for the collective establishment of rates, charges, classifications, rules, regulations and practices for loading and unloading trucks at intervenors' piers (JA 59). Agreement No. 8005 has at all times been approved by the Federal Maritime Board and Commission under section 15 of the Shipping Act, 1916 (39 STAT. 733, as amended, 46 U.S.C. § 814) (JA 11).

Agreement No. 8005 provides in pertinent part:

> "1. That they [intervenors] shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to such services. . . ."

Pursuant to this Agreement, intervenors from time to time issued Tariffs Nos. 1, 2, 3, and 4, all of which set forth rates, charges, rules, regulations, and practices for truck loading and unloading at intervenors' piers (JA 12). Tariffs Nos. 3 and 4 were the subject of earlier litigation in the Board between the present petitioners and intervenors; the Board required modifications in the tariffs and, as modified, approved them (*Empire State Highway Transportation Association* v. *American Export Lines*, 5 F.M.B. 565 (1959)). On January 15, 1960, again pursuant to the Agreement, intervenors issued and filed Tariff No. 5, changing the rate levels (JA 23, 50).[4]

Petitioner then filed its complaint with the Board, naming intervenors as respondents, and alleging (1) that "Tariff No. 5 constitutes an agreement or modification of the Agreement [No. 8005] within the meaning of Section 15 of the Shipping Act, 1916, as amended, and may not become effective without the prior approval of the Board"; and (2) that Tariff No. 5 was unlawful in that the rates, charges, and practices therein were excessive, discriminatory, detri-

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[4] Tariff No. 5, like its predecessor tariffs, contains classifications, rules and regulations necessary for its interpretation and application. These classifications, rules and regulations are substantially the same as those in its previously approved predecessor tariffs.

mental to the commerce of the United States, and unjust and unreasonable (JA 1-15). The complaint prayed for suspension of the tariff pending determination of its lawfulness and for an investigation (JA 14).

Before a responsive pleading was filed, petitioner amended this complaint by deleting all allegations that the rates, charges, and practices were excessive, discriminatory, detrimental to commerce, unjust, unreasonable, or otherwise unlawful (JA 17-19). As amended, the complaint alleged merely that Tariff No. 5 was a new agreement or modification of agreement unapproved under section 15 (*id.*). On that ground it prayed that the operation of the tariff be suspended and that respondents be required to submit the tariff for approval as a section 15 agreement (JA 19). The amended complaint contained no suggestion that the Board should not approve the tariff, and the amendment deleted all allegations of grounds upon which a disapproval could have been based. Upon motion of intervenors the Board dismissed the complaint for failure to state a claim upon which relief could be granted.

On judicial review instituted by petitioner, the Court of Appeals affirmed the Board's order, approving 35 years of unbroken administrative construction of section 15 and deliberate Congressional ratification to the effect that tariffs authorized and contempated by an approved basic agreement are not new agreements or modifications of the basic agreement within the meaning of section 15 and do not require separate approval under section 15. As the court recognized, in case a rate or rule in such a tariff should contravene the standards of section 15 the Board had express statutory authority to withdraw its approval of the basic agreement forthwith, "whether or not previously approved by it" (see the second paragraph of old section 15 (pet. 17)).

ARGUMENT

I. THE CASE HAS BEEN RENDERED MOOT AND EMPTIED OF FUTURE SIGNIFICANCE BY THE OCTOBER 3, 1961, AMENDMENT TO SECTION 15

On October 3, 1961, the President signed Public Law 87-346, which, after more than three years of controversial deliberation in both Houses, the aftermath of this Court's decision in *Isbrandtsen Co.* v. *United States*, 356 U.S. 481 (1958), revised the Shipping Act, 1916. Section 2 of Public Law 87-346 rewrote section 15 of the Shipping Act, 1916. It now provides (*infra*, p. 2a):

> ". . . tariff rates, fares, and charges, and classifications, rules and regulations explanatory thereof . . . agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of Section 18(b) hereof. . . ."

This settles, at least for the future, that tariffs issued pursuant to an approved basic agreement or conference do not require separate approval. The new statute thus makes express the construction given by the Board and the Court of Appeals to the old statute and answers the question presented by the petition as the Board and the court below answered it.

1. The amendment renders the case moot. *United States* v. *Alaska Steamship Co.*, 253 U.S. 113 (1920); *Luckenbach Steamship Co.* v. *United States*, 364 U.S. 280 (1960). Even if the tariff required approval under the old law, it no longer requires approval. Petitioner has claimed no damage for the interim between the filing of the tariff and the enactment of the new law, and has alleged no ground upon which the Board could have based a disapproval of the tariff if its approval or disapproval were required

during that interim.[5] In any event, the amendatory statute, which is procedural, may be applied retroactively to the date of filing of the tariff. *Cf. Federal Broadcasting System* v. *FCC*, 239 F. 2d 941 (D.C. Cir. 1956).

2. Mootness aside, the law is clear for the future; and the present case, involving only the construction of the old law, loses whatever public importance it might otherwise have had. Even under the old statute the question presented was not a live issue [illegible] pending case raising the question, and with two arguable exceptions that are not truly exceptions,[6] it is the only litigated case—in court or agency—on the question in the 45-year history of the Shipping Act, despite the existence for at least the past 35 years of a clear and unbroken course of administrative interpretation, discussed hereinbelow (pp. 9-15).

II. EVEN UNDER THE OLD LAW THE PETITION PRESENTED AN ABSTRACT, HYPOTHETICAL QUESTION WITHOUT PRACTICAL CONTENT

Petitioner deliberately amended its complaint to delete every allegation that the rates or tariff rules were discriminatory, excessive, unreasonable, or otherwise unjust or unlawful. The amended complaint, therefore, failed to allege any fact constituting a ground for disapproval of the tariff. Such a complaint was no different from an assertion that the tariff was a section 15 agree-

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[5] Indeed, petitioner deliberately amended its complaint to delete all such allegations (see p. 4, *supra*).

[6] The arguable exceptions are the 1959 case brought by the present petitioner (*Empire State Highway Transportation Association* v. *American Export Lines*, 5 F.M.B. 565 (1959)), of which the present case is, in a sense, merely a continuation, and a 1927 general investigation instituted by the agency on its own motion, in which it first adopted its long standing construction (*Section 15 Inquiry* (*Ex Parte* No. 4), 1 U.S.S.B. 121 (1927)); this was a general investigation and rule-making rather than an adversary litigation.

ment but that the Board should approve it.[7] The Board necessarily dismissed the complaint for failure to state a claim upon which relief could be granted. If the Court were to adopt petitioner's construction of the law and reverse the judgment below, the only result would be to return the case to the Commission to decide whether the tariff should or should not be approved; and the Commission would have no alternative but to approve it, thus leaving the parties in the same position as that in which the Board and the Court of Appeals left them.

There is, therefore, no practical issue before this Court; petitioner was not harmed by the Board's order. Its avowed object (JA 41) in instituting the proceeding was to obtain an advisory opinion on an abstract question of law. This Court has frequently indicated its unwillingness —even its lack of power—to decide such questions.[8]

If after the tariff became effective anyone raised grounds for its disapproval, the Board could and would disapprove the tariff through its power to withdraw approval of the basic Agreement "whether or not previously approved by

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[7] Section 15 was mandatory that filed agreements "shall" be approved, absent reasons for disapproval. Its material provisions were: "the board may by order disapprove, cancel or modify any agreement . . . that it finds to be [1] unjustly discriminatory or [2] unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or [3] to operate to the detriment of the commerce of the United States, or [4] to be in violation of this Act, and *shall approve all other agreements, modifications, or cancellations.*" [Numerals and emphasis supplied].

[8] E.g., *California* v. *San Pablo & Tulare R.R.*, 149 U. S. 308 (1893); *Muskrat* v. *United States*, 219 U.S. 346 (1911); *Willing* v. *Chicago Auditorium Ass'n*, 277 U.S. 274 (1928); *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118 (1939); *Tileston* v. *Ullman*, 318 U.S. 44 (1943); *Poe* v. *Ullman*, 367 U.S. 497 (1961); cf. *Cover* v. *Schwartz*, 133 F. 2d 541, 543-547 (2d Cir.), *cert. denied*, 319 U.S. 743 (1943).

it."[9] This was fully as efficacious as a power of approval over tariffs upon filing; upon a showing of good cause the Board would grant interlocutory relief immediately upon the filing of a complaint alleging that the tariff contravened one or more of the standards under which the validity of section 15 agreements was judged.[10] Thus, in practical terms, the issue in this case is merely whether the old section 15 required automatic suspension of conference tariffs pending approval, which in the absence of a showing of grounds for disapproval would be a mere formality, or whether such tariffs could lawfully become effective upon filing, subject to immediate withdrawal of approval upon such a showing.

III. THE DECISION BELOW IS CLEARLY CORRECT

Petitioner's construction of the Shipping Act, 1916, wrenches a single clause out of context and uses it to do violence to the rest of the Act, its scheme and purpose, and the manifest intent of Congress. Petitioner's construction would require (a) advance approval of all new conference tariffs before they became effective, and (b) indefinite suspension of new tariffs pending approval. In contested cases suspension could continue for several years, since the Board cannot and does not approve protested section 15 agreements until after a hearing, which may require

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[9] E.g., *Edmond Weil* v. *Italian Line "Italia"*, 1 U.S.S.B.B. 395, 398 (1935); *Pacific Coast-River Plate Brazil Rates*, 2 U.S.M.C. 28 (1939); cf. *Contract Routing Restrictions*, 2 U.S.M.C. 220, 227 (1939); *Contract Rates—North Atlantic Freight Conf.*, 4 F.M.B. 98, 106 (1952).

[10] E.g., *Pacific Far-East Line* v. *Pacific Westbound Conference*, FMB Docket No. 915 (orders of September 19 and 26, 1960).

years.[11] The prior approval and indefinite suspension requirements would apply indiscriminately to carriers in the foreign trades, domestic carriers, and "other persons subject to this act," for section 15 cuts across all these.

1. Prior approval and indefinite suspension provisions would make the Shipping Act broader than any federal rate regulatory statute. Under all such statutes, rates may become effective without prior approval and may be suspended only for limited times (the longest being seven months) and only upon a showing of probable unlawfulness and a written agency statement of reasons.[12]

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[11] Petitioner denies (Pet. 13) that a hearing would be required. But the Board's general counsel has given an opinion that a hearing is required (see "MONOPOLY PROBLEMS IN REGULATED INDUSTRIES", HEARINGS BEFORE THE ANTITRUST SUBCOMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY, 86TH CONG., 1ST SESS. 53 (1959)); the Board has repeatedly so stated to Congress; and it has in fact regularly held hearings on protested section 15 agreements.

[12] All Federal rate regulatory statutes, of which the Interstate Commerce Act is the prototype, have in common certain characteristics which distinguish them from section 15. All require that rates be "just and reasonable"; forbid, upon pain of criminal penalties and liability for reparations, deviation from filed rates; require prior notice for changes in filed rates; permit suspension of rate changes, but only for a specified period of time, after which the rates go into effect whether or not approved, and only upon a finding, for stated reasons, of probable violation. Section 15 contains none of these provisions. See, *e.g.*, sections 6(1), 6(7), 15(1), and 15(7) of the Interstate Commerce Act, Part I (24 STAT. 380, 384, 44 STAT. 1447, as amended, 49 U.S.C. §§ 6(1), 6(7), 15(1), 15(7)); sections 216(e) and (g) and 217(b) and (d) of the Interstate Commerce Act, Part II (49 STAT. 558, 560, 49 U.S.C. §§ 316(e), (g), 317(b), (d)); sections 306(a) and (c) and 307(b) and (g) of the Interstate Commerce Act, Part III (54 STAT. 935, 937, 49 U.S.C. §§ 906(a), (c), 907(b), (g)); sections 405(a) and (c) and 406(b) and (e) of the Interstate Commerce Act, Part IV (56 STAT. 287, 288, 49 U.S.C. §§ 1005(a), (c), 1006(b), (e)); sections 403 and 1002(d) and (g) of the Federal Aviation Act of 1958 (72 STAT. 758, 788, 49 U.S.C. §§ 1373, 1482(d), (g)); sections 4 and 5 of the Natural Gas Act (52 STAT. 882, 15 U.S.C. §§ 717c, 717d); sections

The Shipping Act is narrower, not broader, than such statutes. Congress conferred suspension powers for the first time under any statute, in the Mann-Elkins Act of 1910 (36 STAT. 551, 49 U.S.C. § 15(7)), amending the Interstate Commerce Act just two years before the Alexander investigation that led to the Shipping Act. The suspension power was adopted instead of a proposed requirement for ICC approval of all rates before they became effective; prior approval was rejected as too radical (1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 59 n. 61 (1936); see S. 6737, 61ST CONG., 2D SESS., (1910)).

Congress did not then almost immediately write a prior approval provision into the Shipping Act. Indeed, it deliberately rejected even the less stringent regulation of the Interstate-Commerce-Act type and required no advance filing of tariffs, no suspension, and no regulation of the level of rates in the foreign trade. The draftsmen thus explained the bill to the House Committee ("REGULATORY FEATURES OF THE SHIPPING BILL", HEARINGS BEFORE THE HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES ON H.R. 14337, 64TH CONG., 1ST SESS. 12 (1916)):

> "The law, however, does not provide that the board shall require carriers by water in foreign commerce to file their rates or tariffs. Experience will show whether it is practicable and desirable to require ocean carriers in the foreign trade to file their rates and to charge only such rates as have been filed with the Government. This difference between the pending measure and the present interstate commerce law is of present importance. This bill, if enacted into law, will provide a very different kind of regulation, by the

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205 and 206 of the Federal Power Act (49 STAT. 851, 16 U.S.C. §§ 824d, 824e); sections 203 and 204 of the Federal Communications Act (48 STAT. 1070, 47 U.S.C. §§ 203, 204); section 306 of the Packers and Stockyards Act (42 STAT. 164, 7 U.S.C. § 207); and sections 2, 3, and 4 of the Intercoastal Shipping Act, 1933 (47 STAT. 1425, 52 STAT. 964, 46 U.S.C. §§ 844, 845, 845a).

> shipping board, over the rates of ocean carriers, than the Interstate Commerce Commission exercises over carriers by rail. In the case of carriers by rail, their rates must be published and filed with the commission: only the published rate may be charged; no change in the rate, up or down, may be made except upon 30 days' notice to the Government, and any important increase in rates may be suspend [sic] by the Interstate Commerce Commission; thus giving the commission practical control over the rates of the railroads. There is no such proposition contained in the proposed measure."

The House Committee first conceived and then abandoned a plan to regulate the level of shipping rates in the foreign trade (see H.R. 14337, 64th Congress). Even this regulatory proposal contained no advance filing requirement and no suspension powers; rates could be set aside only after becoming effective if found to be unreasonably high. In the end, with respect to the foreign trades, the Committee deleted even this provision from the bill.

Having abandoned rate regulation and decided not to require advance filing or approval of rates, Congress did not insert such provisions *sub silentio* into section 15, which regulates conferences. Section 15 in its final form was in the proposed legislation from the beginning of the legislative process. The draftsmen made clear that conferences were to be subject to no greater or different rate regulation than non-conference operators (HEARINGS, *supra*, at 17):

> "DR. JOHNSON. . . . The powers conferred by this bill upon the proposed shipping board are purely corrective powers as regards rates. They are not powers to prescribe, ab inito [sic], a scheme of rates or a system of rates to prevail in the field of ocean transportation. The line carriers, or individual shipowners, will go ahead after this law is passed and work out their own rates, and will not even be obliged

to file them with the Government unless they are joint rates.

"MR. HARDY. That is, you mean unless they are conference rates?

"DR. JOHNSON. No; unless they are joint interline rates over two connecting water carriers."

2. Petitioner's construction would also obliterate distinctions, carefully preserved by the Shipping Act, between the domestic and foreign trades. Under the Act, as amended by the Intercoastal Shipping Act, 1933 (47 STAT. 1425, 46 U.S.C. 844), the Board (now the Commission) has rate regulatory powers of the Interstate-Commerce-Act type over the offshore domestic trades. In these trades the statute requires adherence to filed rates and 30 days' advance notice of rate changes, gives the Board power to fix maximum and minimum rates, and confers suspension powers. But the suspension powers may be exercised only upon a statement in writing of reasons, and the maximum duration of suspension is four months. In enacting these provisions in 1933 Congress was conscious that section 15 required no rate filings and permitted no suspension; one of the stated reasons for the new law was that "Conference agreements have frequently failed to stabilize rates, and from time to time rates have fluctuated without notice . . ." (H. REPT. No. 2006, 72d CONG., 2d SESS. 4 (1933)). If the conference rates were section 15 agreements, they could not have "fluctuated without notice".

3. The conclusions from the structure and legislative history of the statute are reinforced by an unbroken course of administrative practice and construction, repeatedly announced to Congress during reenactments of the Shipping Act, and of section 15 in particular. Hundreds of thousands of conference rates have been put into effect without prior approval; the Board itself published rates in this manner while an important steamship operator and

conference member. In *Section 15 Inquiry (Ex Parte No. 4)*, 1 U.S.S.B. 121, 125 (1927), it announced that conference tariffs are not section 15 agreements, and published regulations so providing (6 Fed. Reg. 6410, 46 C.F.R. § 22.16). Shortly afterward, Congress comprehensively reviewed and amended the Shipping Act, in the Merchant Marine Act, 1928 (45 Stat. 690, 46 U.S.C. § 891), without touching section 15.

The enactment of the Intercoastal Shipping Act, 1933, again without affecting section 15, was predicated in part upon the effects—as to the domestic trade—of the administrative practice of permitting tariffs to go into effect without approval (see page 12, *supra*).

In *Section 19 Investigation, 1935*, 1 U.S.S.B.B. 470, 500-503 (1935), the Board promulgated regulations (22 Fed. Reg. 1017, as amended, 46 C.F.R. § 235.1) requiring the filing of tariffs of export rates 30 days *after* their effective date. The regulation applied to conferences. If section 15 approval of conference tariffs were contemplated, the filing would have had to precede, not follow, the effective date, and the regulation would have been surplusage as to conferences. The Board called attention to these regulations in its 1935 and 1936 annual reports to Congress,[13] while it was involved in the comprehensive revision of shipping and merchant marine laws from which emerged the Merchant Marine Act, 1936. Again section 15 was untouched.

In the intensive deliberations leading to the October 3, 1961, amendments, Congress studied the Board's practices in approving section 15 agreements and had before it testimony of the Chairman of the Board pointing out that there were no provisions for advance filing or suspension of tariffs in the foreign trade, including conference tariffs.

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[13] Annual Report of the United States Maritime Commission, 1936, 16; Annual Report of the Secretary of Commerce, 1935, 191.

With this information, Congress twice enacted interim legislation to preserve the status quo with respect to dual rate agreements, pending a decision on permanent legislation (Act of August 12, 1958, P.L. 85-626, 72 STAT. 574; Act of June 29, 1960, P.L. 86-542, 74 STAT. 253 (46 U.S.C. § 812)). In neither amendment did it do anything to alter the administrative construction. The permanent legislation of October 3, 1961, as we showed above (p. 5), expressly enacted the administrative practice.

4. Section 15 exempts approved agreements from the Sherman Antitrust Act; the requirement of Board approval is a substitute for Sherman Act regulation. The Board's function under section 15 is to weigh the disadvantages to the public interest from an antitrust exemption against the advantages which Congress found inhere in steamship conferences.[14] This weighing process can be as effectively performed when the Board decides whether to approve the basic Agreement as when a tariff is filed thereunder. The Board is aware of both the Shipping Act benefits and th. antitrust problems when the basic agreement is filed.[15] The antitrust problem lies in the concerted rate-making, not in the particular rates so made. But the provision for concerted rate making appears in the basic Agreement; the filing of the tariff adds nothing to the Board's knowledge and ability to weigh the relevant factors. It follows that

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[14] See H. Doc. No. 805, 63D CONG., 2D SESS. 416 (1914) (the Alexander Report).

[15] In the present case, the Board has previously required modifications in the basic agreement reflecting antitrust and other basic public interest considerations, namely, (1) the filing and publishing of tariffs (JA 60); (2) strict adherence to tariffs (JA 59); (3) free entry into the conference by any terminal operator (JA 60); (4) free withdrawal from the conference on 30 days notice (JA 60); and (5) maintenance of just and reasonable rates, charges, classifications, regulations, and practices (JA 59). *Empire State Highway Transp. Ass'n* v. *American Export Lines*, 5 F.M.B. 565, 591, 592, 595-6 (1959).

the tariff is not the kind of "agreement" contemplated by section 15.

IV. THERE IS NO CONFLICT

Petitioner's assertion (pet. 7) that the Court of Appeals "overlooked" or "misread" *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), is gratuitous. The case was not cited to the Court of Appeals, and its omission was an accurate reflection of its irrelevance. That case, under the Natural Gas Act, involved an agreement between the maker of the rates and a user of the service subject to the rates—not, as in the present case, an agreement between parties making rates in conference. The Court did not suggest that the validity of the agreement depended in any way upon FPC approval. The Natural Gas Act has no provision analogous to section 15 of the Shipping Act, and unlike the Shipping Act, contains conventional provisions for the suspension and regulation of rates.

There is no intra-circuit conflict, even if such a conflict warranted review by this Court. Judge Fahy, who wrote the opinion below, also sat on the court which decided *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D.C. Cir.), *cert. denied* sub nom. *Japan-Atlantic & Gulf Conf.* v. *United States*, 347 U.S. 990 (1954). His opinion points out (pet. 24) that the two cases differ in degree. The *Isbrandtsen* case involved a tariff of contract non-contract dual rates, which affected the competitive structure of the trade as between carriers, and hence altered the balance between antitrust considerations and the advantages of conference rate making. The tariff of single rates involved here has no such effect on the balance of considerations.

CONCLUSION

For the reasons stated it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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